No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

STATE OF NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

FRANCISCO M. NEGRÓN, JR.
Chief Legal Officer
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street, FL 2
Alexandria, VA 22314
(703) 838-6722

RICHARD P. BRESS
Counsel of Record
SAMIR DEGER-SEN
CHERISH A. DRAIN*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
richard.bress@lw.com

*Admitted to practice in Pennsylvania only. All work supervised by a member of the DC Bar.

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are a collection of educational organizations that are deeply concerned about the significant and adverse consequences that the Nation's state and local government agencies will suffer if this Court does not apply its usual presumption of judicial review under the Administrative Procedure Act ("APA") to the Secretary's actions. As entities involved in the provision of public education, amici are impacted by a complex and interlocking set of federal agency regulations and actions. They share a strong interest in ensuring that federal agencies respect statutory and regulatory limitations and engage in reasoned decision-making, so as not to issue regulations or take actions that unnecessarily harm state and local educational interests. Judicial review ensures that agencies provide transparency to and allow for meaningful participation by organizations such as amici. It is a critical bulwark against unreasoned and unlawful agency action.

Amici have grave concerns about the Secretary's decision to include a citizenship question on the 2020 decennial census and the misallocation of federal funds that would result from the resulting undercount of certain populations. Under this Court's ruling in *Plyler v. Doe*, public schools have a

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[1] The parties have filed blanket consents to the filing of briefs *amici curiae*. No counsel for a party authored this brief in whole or in part; and no such counsel, any party, or any other person or entity—other than amici curiae and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

constitutional duty to educate all students regardless of citizenship status. 457 U.S. 202 (1982).

As organizations that play a vital role in providing public education, amici seek to make this Court aware that judicial review is essential as a safeguard to protect the collection of census data, which facilitates amici's ability to meet that constitutional duty to educate all. The following education associations respectfully submit this *amici curiae* brief in support of respondents:

The National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards across the country. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as amicus curiae in numerous cases before this Court. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA is particularly concerned about the ramifications for public education and the students it serves that will result from an undercount caused by the addition of a citizenship question to the 2020 decennial census.

The School Superintendents Association ("AASA") represents more than 13,000 school system leaders and advocates for the highest quality public education for all students. Our Nation's superintendents and the districts and students they serve rely on robust, accurate census data to ensure federal education dollars are appropriately allocated to the areas of true need.

The National Association of Secondary School Principals ("NASSP") is the leading organization of, and voice for, principals and other school leaders across the United States. NASSP believes that each child is entitled to an excellent public school education regardless of immigration status. Adding a question on citizenship status to the decennial status will have a serious adverse impact on undocumented children and on the schools that seek to provide the best possible education to all school children.

The National Association of Elementary School Principals ("NAESP") was founded in 1921. NAESP is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. NAESP seeks to serve as an advocate for children and youth by ensuring them access to an excellent education.

The Association of School Business Officials International ("ASBO"), through its members and affiliates, represents approximately 30,000 school business professionals worldwide. ASBO members are the financial leaders of school systems who manage educational resources to support student learning. School business officials rely on accurate census data to inform Title I and other critical program funding formulas to support each student's unique educational needs.

SUMMARY OF ARGUMENT

The decennial census has been a centerpiece of this Nation's democratic process from our beginning. "While other nations had attempted population counts, none had made the count itself an important method of maintaining democracy by mandating it through a founding document." *Utah v. Evans*, 536 U.S. 452, 510 (2002) (Thomas, J., concurring in part, dissenting in part). The census continues to be the keystone of the allocation of electoral power. But today it is also the fulcrum for the allocation of hundreds of billions of dollars of funding for vital governmental programs. And countless public and private institutions rely on an accurate census to shape policy, set priorities and distribute resources. As amici can attest, even relatively small errors in the census count can have far-reaching effects on tens of millions of individuals.

In March 2018, the Secretary of Commerce announced the addition of a citizenship status question to the 2020 decennial census questionnaire. Pet. App. 548a-63a. This decision was a reversal of the United States Census Bureau's practice of not including such questions on the decennial census, in light of significant evidence that a such a question would lead to underreporting and an inaccurate census count. *Id.* at 42a-50a. In a thorough and well-reasoned opinion, the district court concluded that the Secretary's addition of the question violated the APA because the decision was not made "in accordance with law," and was arbitrary and capricious. *Id.* at 259a (citation omitted), 284a.

The Government asks this Court to reverse that decision, among other reasons, because in the

Government's view the Secretary possesses unchecked discretion over the census questionnaire and APA review is thus barred because the action "is committed to agency discretion by law." Pet'rs' Br. 21 (quoting 5 U.S.C. § 701(a)(2)).

Amici agree with respondents that the Secretary's decision to include a question about citizenship in the census was arbitrary and capricious and contrary to law, and that the district court's judgment decision should be affirmed. But regardless of this Court's resolution of that issue, the Court should firmly reject the Government's position that this decision is committed to the Secretary's unfettered discretion. The Government's argument conflicts with decades of controlling precedent, and its acceptance would vastly expand the historically narrow exception to judicial review under the APA, with enormous collateral effects on the reviewability of agency action in a vast array of contexts not before the Court.

As this Court has made clear time and again, there is a virtually irrebuttable presumption in favor of judicial review, and the narrow exception to presumptive reviewability under the APA for actions committed to agency discretion as a matter of law applies *only* when there is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citation omitted). When the Constitution or a statute imposes a *mandatory* duty or limitation on an agency, there is by definition "law to apply." Here, the Constitution and Congress have placed numerous constrains on the Secretary which define and limit his discretion and permit adjudication of whether the Secretary has violated those mandates and limitations in an arbitrary or capricious manner. Even though Congress has vested substantial

discretion in the Secretary regarding his conduct of the census, his exercise of that discretion is not above the law.

Neither this Court nor any court has *ever* held that an issue approaching the public importance of the census is committed to agency discretion under this exception to APA review. That narrow exception has historically been limited to one-off decisions regarding agency enforcement or internal employment matters; it has never been applied to agency decisions directly affecting the democratic process and impacting hundreds of millions of stakeholders. In the area of public education alone, an inaccurate census count could impact billions of dollars flowing to vulnerable population groups in the parts of the country most in need. It is inconceivable that Congress intended decisions of this magnitude to be immune from judicial review. Amici urge this Court to approach the Government's position on this issue with appropriate skepticism and firmly reject its assertion of unfettered agency power in this area of enormous public importance. The Court should affirm the district court's holding that the Secretary's decision is indeed subject to judicial review.

ARGUMENT

I. THE EXCEPTION TO JUDICIAL REVIEW FOR ACTIONS COMMITTED TO AGENCY DISCRETION IS NARROW, RARELY APPLIED, AND DISFAVORED

Agency action "engender[s] serious reliance interests" amongst regulated parties who depend on the stability and predictability of agency guidance. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Public school districts, for example, rely

or agency decisions to make policy in numerous contexts—employment, student data management, and school meals, to name just a few. Judicial review promotes accountability by compelling an agency to consider all relevant factors, thoroughly explain any inconsistency with its prior positions and maintain compliance with statutory and constitutional mandates. Judicial review thus plays a vital role in ensuring the transparency and thoroughness of agency decision-making, and is a critical safeguard for those whose lives, livelihoods, and funding are impacted directly by the decisions of federal agencies.

Recognizing this, Congress provided in the APA that any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, *is entitled to judicial review thereof.*" 5 U.S.C. § 702 (emphasis added). This Court has long held that this provision of the APA creates a virtually irrebuttable presumption of judicial review. *See, e.g.*, *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018); *Mach Mining, LLC v. Equal Emp't Opportunity Comm'n*, 135 S. Ct. 1645, 1651 (2015); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

This presumption is subject to only two limited exceptions. 5 U.S.C. § 701(a)(1), (2). The first is where a statute specifically precludes judicial review. *Id.* § 701(a)(1). The Government does not contend this exception applies, nor could it as there is "no 'showing of "clear and convincing evidence" of a . . . legislative' intent to restrict access to judicial review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (alteration in original) (quoting *Abbott Labs.*, 387 U.S. at 141)).

The second exception, on which the Government does rely, applies in instances where actions are committed to agency discretion by law. 5 U.S.C. § 701(a)(2). Because the APA generally contemplates judicial review of actions involving discretionary decisions, this "very narrow" exception applies only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is *no law to apply*.'" *Overton Park*, 401 U.S. at 410 (emphasis added) (quoting S. Rep. No. 79-752, at 26 (1945)); *see also Weyerhaeuser*, 139 S. Ct. at 370. If there is *any* judiciable standard under which the lawfulness of agency action can be judged, that action is reviewable under the APA.

In *Mach Mining*, for example, this Court addressed whether the Equal Employment Opportunity Commission's (EEOC) conciliation efforts were committed to agency discretion as a matter of law. 135 S. Ct. at 1650. Title VII states that the EEOC "shall endeavor to eliminate [an] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* at 1651 (alteration in original) (quoting 42 U.S.C. § 2000e-5(b)). But it gives the EEOC broad discretion to decide how to engage in, and when to give up on, conciliation. *Id.* at 1652. Nonetheless, this Court concluded that conciliation was subject to judicial review, because the statute did not leave "*everything* to the Commission." *Id.* As the Court explained, "if the EEOC declined to make any attempt to conciliate a claim" it would not satisfy the requirement that it "endeavor" to conciliate. *Id.* And, it held, the use of the words "conciliation and persuasion" further connote that the agency must at least tell the "employer about the claim and . . . provide the

employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." *Id.*

As *Mach Mining* illustrates, the "no law to apply" requirement is taken literally. *Id.* When a statute imposes a mandatory obligation on an agency there is *by definition* "law to apply" because the agency cannot simply decline to comply with that obligation. And if an agency complies in name only—for example, purporting to "conciliate" but failing to meaningfully "discuss the matter" with the employer—a court *can review* the degree to which those efforts are undertaken in good faith, and thus comport with the statute's mandatory requirements. As the Court suggested in *Mach Mining*, if an employer had no "opportunity to discuss" its position, an agency's proffer that it engaged in "conciliation" would be entitled to no weight—and certainly would not be unreviewable. *Id.*

The courts of appeals uniformly have applied this framework. In *Salazar v. King*, for example, the Department of Education contended that a statute providing for loan discharge committed the decision to the Secretary's discretion. 822 F.3d 61, 77 (2d Cir. 2016). The statutory provision, in relevant part, stated that if a borrower's "eligibility to borrow under this part was falsely certified by the eligible institution . . . then the Secretary *shall* discharge the borrower's liability." *Id.* (alterations in original) (citation omitted). The Department contended that the obligation was only triggered when the Secretary "determines" or receives "information [he] believes to be reliable" that a borrower may be eligible for discharge. *Id.* at 79. The Second Circuit disagreed, holding that the "mandatory, non-discretionary language creates boundaries and requirements for

agency action and shows that Congress has not left the decision . . . to the discretion of the agency." *Id.* at 77; *see also Hyatt v. U.S. Patent & Trademark Office*, 797 F.3d 1374, 1379-82 (Fed. Cir. 2015) (stating that statutory language provided at least "one concrete, reviewable" mandatory requirement allowing for judicial review despite "lack of enumerated factors"); *cf. Sluss v. U.S. Dep't of Justice*, 898 F.3d 1242, 1251-52 (D.C. Cir. 2018) (stating that, although treaty vested wide latitude in Attorney General, it "has not left *everything*" to him and judicial review under APA was thus appropriate (citation omitted)).

By contrast, this Court has recognized that a decision *is* committed to agency discretion as a matter of law in only two narrow circumstances: (1) an agency's refusal to take an enforcement action, where the authorizing statute creates no mandatory requirement to act; or (2) a statutory delegation of discretion entirely to the *subjective* judgment of the agency.

Heckler v. Chaney illustrates the first category. 470 U.S. 821 (1985). There, the Court considered whether the Food and Drug Administration's decision *not* to undertake an enforcement proceeding against the use of certain drugs in administering the death penalty was subject to judicial review. *Id.* at 824-25. The Court recognized that an "agency's decision *not* to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831 (emphasis added). This stood in marked contrast to situations where "an agency *does* act to enforce," because that action "can be reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832.

And, critically, the Court was careful to distinguish the provision in *Heckler* from statutes that, unlike there, "required" an agency to act. *Id.* at 823. In particular, the Court distinguished the non-enforcement decision in *Dunlop v. Bachowski*, 421 U.S. 560 (1975)—which *was* judicially reviewable—because the statute there dictated that the agency, "upon filing of a complaint by a union member, . . . *shall* investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he *shall* . . . bring a civil action." *Heckler*, 470 U.S. at 833 (alterations in original) (emphasis added) (citation omitted). *Heckler* thus stands for the narrow proposition that when an agency's authorizing statute does not require an agency to take an enforcement action, its decision to refrain from acting is not judicially reviewable.

The second category is illustrated by *Webster v. Doe*, 486 U.S. 592 (1988). There, the relevant statute stated that "[t]he Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever *he shall deem* such termination necessary or advisable in the interests of the United States." *Id.* at 594 (emphasis added) (quoting 50 U.S.C. § 403(c) (1988)). The critical feature of the statute, the Court recognized, was that it did not create any mandatory—or even objective—requirement for the agency to follow. Instead, termination was permitted "whenever the Director '*shall deem* such termination necessary or advisable . . .,' not simply when the dismissal *is* necessary." *Id.* at 600 (emphasis altered). Thus, "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to

those interests, [there was] no basis on which a reviewing court could properly assess an Agency termination decision." *Id.*

Taken together, this Court's cases thus establish a clear framework for assessing whether the narrow exception for matters committed to agency discretion applies. All agency actions taken pursuant to statutory provisions which *require* an agency to act—or restrict how an agency may act when it chooses to—are judicially reviewable. Only when there is no mandatory requirement on the agency at all may its actions be deemed committed to agency discretion.

Outside of that limited circumstance, this Court has explained, "compliance with the law [cannot] rest in the [agency's] hands alone." *Mach Mining*, 135 S. Ct. at 1652. "We need not doubt [an agency's] trustworthiness, or its fidelity to law, to shy away from" permitting an agency unfettered discretion. *Id.* "We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence. *Id.* at 1652-53.

II. IN THIS CASE, THE CONSTITUTION AND STATUTORY FRAMEWORK PROVIDE LAW TO APPLY

Applying this framework, the Government's assertion that the Secretary's census decision has been committed to his discretion as a matter of law is simply incorrect. Both the constitutional and statutory grants of authority provide clear limits on the Secretary's ability to conduct the census.

First, the Constitution provides for an "actual Enumeration." U.S. Const. art. I, § 2, cl. 3. This provision creates both a mandatory requirement (to

conduct a census) and a justiciable limit on the means of conducting it—such that the count be "actual," i.e. *accurate*. *Second*, when it tasked the Secretary to conduct the census required by the Constitution, Congress enacted limitations designed to discourage the unnecessary inclusion of questions that could jeopardize the constitutional purpose of the census. These statutory limitations provide further "law to apply."

Because the terms of the constitutional and statutory authorizations provide justiciable limits on the Secretary's authority, the Government's assertion that the Secretary's conduct of the census is committed wholly to agency discretion must be rejected. Beyond the profound deleterious impact that it would have in this case on the accuracy of the census, and thereby the allocation of electoral power and hundreds of millions of dollars of funding for the next decade, adoption of the Government's position on this issue would demolish this Court's longstanding framework for assessing the availability of judicial review under the APA, with far-reaching adverse consequences affecting a vast spectrum of agency action not directly at issue here.

1. The Constitution itself provides law to apply. It requires that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3. And this "actual Enumeration" every ten years must involve "counting the whole number of persons in each State." *Id.*; U.S. Const. amend. XIV, § 2.

An "enumeration," at time of the Constitution's ratification, was understood to mean "[a]n account of

a number of things, in which mention is made of every particular article." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 347 (1999) (Scalia, J., concurring in part) (quoting *Webster's American Dictionary of the English Language* (1828)). The text of the provision itself thus creates a *mandatory* requirement—to undertake a census—and places limits on how the requirement is to be fulfilled, i.e. by taking account of "every" person.

As this Court has previously recognized, the language and broader structure of the constitutional delegation of authority confirm this focus on accuracy. "[C]ertain basic constitutional choices . . . to use population rather than wealth, to tie taxes and representation together, to insist upon periodic recounts, and to take from the States the power to determine the methodology all suggest a strong constitutional interest in accuracy." *Utah v. Evans*, 536 U.S. 452, 478 (2002). Thus, as this Court has explained, the Secretary's conduct of the census must "bear . . . a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Wisconsin v. City of New York*, 517 U.S. 1, 19-20 (1996).

The Constitutional requirements that a census be taken and that the census accurately count the number of persons *alone* refutes the Government's position that in evaluating the Secretary's conduct of the census there is no law to apply. No one could reasonably dispute, for example, that if the Secretary decided to undertake no census at all or adopted a methodology for the census that, on its face, was not designed reasonably to accomplish an accurate count, the Secretary would have violated the law. The

courts'—and this Court's—willingness routinely to entertain constitutional challenges to the census process establishes that there is "law to apply."

That is itself sufficient to refute the Government's position. The APA dictates that once there *is* law to apply, an agency must apply that law in a manner that is not arbitrary or capricious—no matter how much discretion a statute otherwise vests in the agency. A grant of discretion might give an agency greater latitude in its decision-making process, but that has no bearing on the antecedent question of whether judicial review is permissible in the first place.

2. The terms of Congress's statutory grant of responsibility and authority to the Secretary provide additional law to apply here. *See* 13 U.S.C. § 141(a). Section 141(a) vests Congress's mandatory duty to ensure the conduct of an "actual Enumeration" in the Secretary, which, as discussed above, alone constitutes sufficient "law" for the Secretary "to apply." When it enacted this law Congress spelled out in unmistakable language its understanding of the Secretary's core constitutional and statutory obligation: to secure a count that is "as accurate as possible, consistent with the Constitution." *Cf.* Pub. L. No. 105-119, § 209(a)(6), 111 Stat. 2440, 2481 (1997).

Section 141(a) goes on to impose *further* justiciable limits on the Secretary's actions. It states that the Secretary "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population . . . in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census

information as necessary." 13 U.S.C. § 141(a). While "as he may determine" denotes substantial discretion, that phrase modifies only the "form and content" of the "census of *population*"—i.e. the way in which the *number* of people is counted and aggregated. The next sentence places an unmistakable limitation on the Secretary's collection of "other census information"—i.e., information other than the "population" or raw number of people, including demographic information. The statute only "authorize[s]" the Secretary "to obtain such other . . . information *as necessary*." *Id.* (emphasis added). The Secretary is thus *not* "authorized" to seek whatever additional information he would like regardless of its effect on his core mandatory duty to accurately count the "population." And that limitation, of course, reflects basic common sense: the Secretary cannot, for example, require individuals to divulge their sensitive medical information in the course of conducting a census. Revealing such information is not "necessary" to further the goal of an accurate count, and indeed would likely undercut that goal by artificially depressing the response rate.

As discussed above, once it is understood that there are *some* limits to the Secretary's discretion, there is by definition "law to apply." The requirement that additional, non-population information be collected only "as necessary" is plainly a judicially enforceable limit.

The Government nonetheless argues that "[i]n *this context*, 'necessary' is properly interpreted as 'convenient' or 'useful,' not 'absolutely necessary.'" Pet'rs' Br. 22 (emphasis added) (citations omitted). In the Government's telling, by "authorizing" the collection of non-population information only "as

necessary," Congress meant to grant the Secretary unfettered discretion to collect *any* information he *desired*.

That interpretation cannot be squared with the language or logic of the provision. "Necessary" means "absolutely needed." *See* Necessary, *Webster's New Collegiate Dictionary* (1975); *see also* Necessary, *American Heritage Dictionary of the English Language* (1981) (defining "necessary" as "essential" or "indispensable"); Necessary, *Concise Oxford English Dictionary* (11th ed. 2004) (defining "necessary" as "needed). Where, as here, the "statutory language is plain, [this Court] must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). The Government's reading not only re-imagines the meaning of the word "necessary," it effectively reads it out of the statute altogether. If Congress had intended to delegate unfettered discretion it could simply have omitted the words "as necessary" from the statute, or used more permissive language such as "convenient" or "useful."

Indeed, in a host of other contexts, Congress *has* chosen to temper its use of the word "necessary" with precisely such permissive language. *See, e.g.*, 7 U.S.C. § 1506(c) (providing Corporation "may purchase or lease and hold" property "as it deems necessary *or* convenient" (emphasis added)); 16 U.S.C. § 797(e) (providing Federal Power Commission power to issue licenses for work "necessary or convenient"); *see also* 42 U.S.C. § 1395x(l)(2) (providing for interchange of information "necessary *or* useful" in the care and treatment of individuals (emphasis added)); 43 U.S.C. § 1352(a)(2) (providing that each federal agency shall provide Secretary of the Interior with any information "which may be necessary or useful to assist him").

These provisions demonstrate that the term "necessary" is not synonymous with "convenient" or "useful"—and that when Congress wishes to use discretionary language, it knows how to do so.

This case is therefore nothing like *Webster*, where the statutory delegation expressly permitted the Director to take any action *he deemed* "necessary." Indeed, the Court in *Webster* expressly distinguished that provision from one which authorized the Director to terminate an employee only when such termination "*is* necessary." 486 U.S. at 600; *see also Franklin v. Massachusetts*, 505 U.S. 788, 817 (1992) (Stevens, J., concurring) (highlighting the "deem . . . advisable" language in *Webster* and noting "[t]here is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion"). As that distinction makes clear, *Webster* did *not*—as the Government implies—hold that the word "necessary" is too vague to supply justiciable standards; instead, *Webster* simply held that there is "no law to apply" when an agency's decision is delegated solely to the *subjective* judgment of the decision-maker. 486 U.S. at 599-601. Here, by contrast, there are multiple, objectively determinable duties statutorily imposed upon the Secretary. In other words, there is "law to apply."

3. In addition to including the express limitation that non-population count inquiries be made only "as necessary," Congress enacted two other provisions that limit in additional ways the Secretary's authority to include such inquiries in the decennial census and thereby provide further "law to apply" when assessing the lawfulness of his actions under the APA.

First, in 1976 Congress added Section 6(c) to Title 13, requiring "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary *shall* acquire and use information available from [any other department, agency, or establishment of the Federal Government or information available via purchase from a State or other unit of government or a private person] *instead* of conducting direct inquiries." Act of Oct. 17, 1976, Pub. L. No. 94-521, § 5(a), 90 Stat. 2459, 2460 (codified at 13 U.S.C. § 6(c)) (emphases added). The section both imposes a nondiscretionary duty and a definitive standard for its exercise. And the non-discretionary nature of this limitation is further confirmed by the fact that it amended a previous version of the statute which permitted—but did not require—the Secretary to obtain information from other federal, state, and local authorities. *See* 13 U.S.C. § 6 (1970).

Second, Congress directed the Secretary to use sampling for collection of information other than for purposes of apportionment. *See* Act of Oct. 17, 1976, Pub. L. No. 94-521, § 10, 90 Stat. at 2464 (codified at 13 U.S.C. § 195) ("Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall* if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." (emphasis added)). As this Court observed, Section 195 "changed a provision that *permitted* the use of sampling for purposes other than apportionment into one that *required* that sampling be used for such purposes if 'feasible.'" *Dep't of Commerce*, 525 U.S. at 341; *see also* H.R. Rep. No. 94-1719, at 13 (1976), *as*

reprinted in 1976 U.S.C.C.A.N. 5476, 5481 ("The section, as amended, strengthens the congressional intent that, whenever possible, sampling shall be used.").

These facially justiciable limitations belie the notion that the Secretary possesses unfettered discretion over the conduct of the census.

Critically, the Government does not argue otherwise. The Government concedes that Congress *has* supplied some judicially reviewable limitations on the conduct of the census, but argues that the Secretary's discretion over census *questions* is unfettered. But nothing in the text of Section 141 even hints at such a distinction. And it would make little sense for Congress to impose fine-grained restrictions on various aspects of the census process while in the same breath delegating unfettered and unreviewable discretion over the questions on the census form—when those questions can themselves have dramatic effects on the census's accuracy. And if the Secretary were to conduct direct inquiries about non-apportionment information without regard to the ready availability of the information from existing governmental databases or the feasibility of using sampling methods, those decisions clearly would be subject to review for their lack of adherence to the limitations imposed by Sections 6(c) and 195. Thus, contrary to the Government's position, the Act's various limitations reflect Congress's intent that the Secretary's actions be subject to judicial review—with each additional limitation helping give further content to the scope of that review.

Finally, when Congress enacted these express limitations, it also imposed a series of reporting requirements intended to provide an additional check

on the Secretary's authority. Well before the census gets underway, the Secretary must brief appropriate congressional committees on the proposed contents of the census. Specifically, at least three years before the census, the Secretary must submit all "subjects proposed to be included, and the types of information to be compiled." 13 U.S.C. § 141(f)(1). And, at least two years before the census, the Secretary must submit a report containing all "questions proposed to be included in such census." *Id.* § 141(f)(2). Although the Secretary can vary from those questions, if he "finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified," he must submit another report "containing the Secretary's determination of the subjects, types of information, or question as proposed to be modified." *Id.* § 141(f)(3). These reporting requirements express additional clear and justiciable limitations on the Secretary's authority to ensure that the census will occur within a transparent and regulated framework.

The Government reads these provisions to mean the opposite: that Congress wished the legislature to be the exclusive forum for review of the Secretary's decisions, to the exclusion of the courts. In other words, the Government reads Congress's imposition of additional limitations on the Secretary to bestow *more* discretion on the Secretary. The Government cites no authority for this counter-intuitive proposition. To the contrary, the available information indicates that Congress intended the reporting requirements to "assure and/or confirm that the statistical needs determined to be in the public interest will be met and particularly that the citizens will not be subject to questions trespassing on their

right of privacy." H.R. Rep. No. 93-246, at 5 (1973). Far from granting the Secretary additional discretion, the reporting requirements were squarely intended to limit the Secretary's access to sensitive information, the collection of which might decrease census accuracy. It would be perverse indeed to read these privacy-enhancing measures as somehow *diminishing* existing judicial review over the collection of information on the census form.

4. To hold, despite all of this, that the presence of the phrase "as he may determine" commits the census process to the Secretary's discretion as a matter of law would constitute a radical expansion of the APA's narrow exception, and have far-reaching implications on the scope of agency power. A search of the U.S. Code reveals that the phrase "as he may determine" appears 108 times, and the similar phrase "in his discretion" over 570 times. There are countless federal statutes that grant discretion to agencies similar to—and greater than—the provision at issue here. *See, e.g.*, 16 U.S.C. § 460a-8 ("The Secretary of the Interior may issue revocable licenses or permits for rights-of-way . . . for such purposes and under such terms and conditions as *he may determine* to be consistent with the use of such lands for parkway purposes." (emphasis added)); 35 U.S.C. § 122(a) (stating the Patent and Trademark Office shall keep applications confidential other than "in such special circumstances *as may be determined* by the Director" (emphasis added)); 25 U.S.C. § 465 ("The Secretary of the Interior is authorized, *in his discretion*, to acquire . . . any interest in lands, water rights, or surface rights to lands . . . for the purpose of providing land for Indians." (emphasis added)). Holding that the census process is committed to the Secretary's

discretion as a matter of law could thus lead to an enormous increase in the unreviewable power of federal agencies across a vast spectrum of issues not before the Court in this case.

5. Finally, the Government and its amici argue that even if the Secretary's actions are judicially reviewable, no consideration of the Secretary's improper motive is permitted under the APA. But the Secretary is not authorized to act outside of the authority granted to him by the constitutional and statutory provisions. And it is well-settled that, once there *is* law to apply, a court may review compliance with that law to ensure the agency's decisions are "rational, *based on consideration of the relevant factors* and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (emphasis added).

To that end, an agency "must either disclose the contents of what it relied upon or, in the case of publicly available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review." *U.S. Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 534-35 (D.C. Cir. 1978); *id.* at 533 ("[W]e simply cannot determine whether the final agency decision reflects the rational outcome of the agency's consideration of all relevant factors when we have no idea what factors or data were in fact considered by the agency."); *cf. Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 344 (D.C. Cir. 1989) (stating an agency must "produce an administrative record and a decision that permits the reviewing court to trace the path of the agency's decisionmaking process"). "Not only must an agency's decreed result be within the

scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (citation omitted).

Thus, the Government's argument that review of the Secretary's motivations is categorically impermissible is contrary to the fundamental nature of APA review. And it would be unjust to regulated or affected parties (like amici) who would no longer be privy to the actual reason for an agency's action. Indeed, amici routinely rely on the APA's judicial review provision to check unexplained agency action. *Council of Parent Attorneys & Advocates, Inc. v. Devos*, No. 18-cv-1636, 2019 WL 1082162, at *13 (D.D.C. Mar. 7, 2019). Yet, under the Government's interpretation, this fundamental check simply evaporates: the Secretary would be permitted to include a question on the decennial census based purely on his own personal curiosity or for personal profit so long as the Secretary offered *any* explanation, no matter how clearly pretextual. The Government's theory is directly counter to the rule that agency action must be "based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *State Farm*, 463 U.S. at 42. And it runs directly counter to this Court's holding in *Mach Mining*—where this Court explained that, when there is "law to apply," whether an agency *meaningfully* complies with that law is subject to judicial review. 135 S. Ct. at 1652-53.

III. THE OPPORTUNITY FOR JUDICIAL REVIEW IS PARTICULARLY CRITICAL IN THIS CASE GIVEN THE SPECIAL NATURE AND FAR-REACHING CONSEQUENCES OF THE DECENNIAL CENSUS

The profound and far-reaching impact of the census separates this case from those limited areas where Congress might be deemed to have intended to commit agency decision-making to agency discretion as a matter of law. Unlike *Heckler* and *Webster*, this case does not involve one-off enforcement or employment decisions, but an essential aspect of the Nation's democratic and policy-making structure. This Court has never held that Congress has committed a decision of such wide-ranging scope to an agency's sole and unfettered discretion, and absent an express prohibition of judicial review or delegation of unreviewable discretion the Court should not presume that Congress did so here.

An accurate census count is critical to the legitimacy of the Nation's allocation of electoral power, and equally critical voting representation in state elections. Its importance in this regard cannot be overstated. But the importance of an accurate census count also extends far beyond the electoral process. *Wisconsin*, 517 U.S. at 5. Census data is relied on to create 52 other Census Bureau surveys and datasets, which are used in a variety of statistical ways, including population estimates.[2]

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[2] Andrew Reamer, GW Institute of Public Policy, George Washington University, *Census-derived Datasets Used to Distribute Federal Funds* 5 (Dec. 2018), https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Counting%20for%20Dollars%20%234%20Census-derived%20Datasets%20rev%2001-19.pdf.

Through myriad federal programs, distribution of federal funds to states is linked directly to the population count obtained during the census. *See Wisconsin*, 517 U.S. at 5-6 ("Today, census data also have important consequences not delineated in the Constitution: The Federal Government considers census data in dispensing funds through federal programs to the States . . . ."). In fiscal year 2015 alone, Census Bureau data was used to distribute more than $675 billion in federal funds across 132 programs.[3]

Census data has a particularly acute impact on federal funding for education. In fiscal year 2015, of the top 11 programs ranked by federal assistance distributed using census data, four programs specifically involved young children and education. The National School Lunch Program, which provides low-cost or free lunches to children each school day, distributed $18.9 billion.[4] Title I grants, which are targeted primarily at schools with the highest percentages of children from low income families,[5] disbursed $14.2 billion.[6] And Special Education

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[3] Maria Hotchkiss & Jessica Phelan, U.S. Census Bureau, *Uses of Census Bureau Data in Federal Funds Distribution* 3 (Sept. 2017) ("*Uses of Census Bureau Data*"), https://www2.census.gov/programs-surveys/decennial/2020/program-management/working-papers/Uses-of-Census-Bureau-Data-in-Federal-Funds-Distribution.pdf.

[4] *Id.*

[5] National Center for Education Statistics, *Fast Facts: Title I*, https://nces.ed.gov/fastfacts/display.asp?id=158 (last visited Mar. 27, 2019).

[6] *Uses of Census Bureau Data* 3, supra note 3.

grants to states, which assist our schools "in meeting the excess costs of providing special education and related services to children with disabilities,"[7] dispensed $11.3 billion.[8] Through Head Start, another $8.5 billion was distributed to help prepare children under five from low-income families for school.[9] And those amounts have only increased. In recent years, the distribution of Title I grants and Special Education grants to states rose to $15.8 billion and $12.3 billion, respectively.[10]

These funds are apportioned out to states and local agencies based on the population statistics obtained through the census. And states with higher levels of child poverty depend on federal funds for education more than states with lower levels of child poverty. For example, in fiscal year 2015, the public school systems in Louisiana and Mississippi received 14.7 percent of their funding from the federal government, the highest level among states.[11] And in a recent

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[7] U.S. Department of Education, *Special Education—Grants to States*, https://www2.ed.gov/programs/osepgts/index.html (last modified May 5, 2016).

[8] *Uses of Census Bureau Data* 3, supra note 3.

[9] Head Start: Early Childhood Learning & Knowledge Center, *Head Start Programs*, https://eclkc.ohs.acf.hhs.gov/programs/article/head-start-programs (last updated Feb. 12, 2019); *Uses of Census Bureau Data* 3, supra note 3.

[10] Andrew Ujifusa, *Here's How Changes to the U.S. Census Could Impact Education Funding*, Education Week (Mar. 28, 2018), http://blogs.edweek.org/edweek/campaign-k-12/2018/03/us_census_changes_education_funding_impact.html.

[11] U.S. Census Bureau, Newsroom Release, *More Than Half Of School Expenditures Spent on Classroom Instruction*

year, those same two states ranked among the top three for highest child poverty rates, defined as an annual income below $25,283 for a family of four, with 28 and 26.9 percent of children under 18 living in poverty.[12] "An inaccurate count . . . [thus] means that the children most dependent upon and in need of the services subsidized by federally funded programs miss out on dollars that support infrastructure and programs promoting the foundations that foster success later in life . . . ."[13]

In addition to playing a central role in the distribution of federal funds, census data also influences local education *policy*. Through the School District Review Program, state officials are able to review census data related to individual school districts.[14] This information, in turn, can be used to guide local education decisions, such as attendance zones, school board election zones, and capital budget needs. The need for accurate census information is accordingly not limited to federal government programs but is also required at the local level to assist in efficient management of our school systems.

(June 14, 2017), https://www.census.gov/newsroom/press-releases/2017/cb17-97-public-education-finance.html.

[12] Children's Defense Fund, *Child Poverty in America 2017: State Analysis* 2 (Sept. 13, 2018) https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-State-Fact-Sheet.pdf.

[13] Nonie Lesaux & Stephanie Jones, *Opinion: When a low census count hurts children's well-being*, Hechinger Report (Sept. 20, 2018), https://hechingerreport.org/opinion-when-a-low-census-count-hurts-childrens-well-being/.

[14] U.S. Census Bureau, School District Review Program, *About This Program*, https://www.census.gov/programs-surveys/sdrp/about.html (last revised Sept. 25, 2018).

Because decennial census population counts are so vital to adequate funding for schools and education policy, census undercounts pose a grave risk to our education system. Under this Court's ruling in *Plyler v. Doe*, public schools have a constitutional duty to educate all students regardless of citizenship status. 457 U.S. 202, 226 (1982). Given the financial impact on funding with the addition of a citizenship question, particularly on public schools in states with the highest populations of immigrants, communities most in need will receive less. And as this Court previously recognized, young children are already vulnerable to undercounting in the decennial census. *See Dep't of Commerce*, 525 U.S. at 322–23 (identifying certain groups, including children, as being at increased risk of undercounting). The Census Bureau has studied this phenomenon in depth.[15] According to its findings, in the 2010 decennial census, approximately 1 million young children, ages 0 to 4, were not counted.[16]

Currently, approximately 5.9 million United States citizen children under the age of 18 live with

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[15] Ron Jarmin, *Improving Our Count of Young Children* ("*Improving Count*"), U.S. Census Bureau Director's Blog (July 2, 2018), https://www.census.gov/newsroom/blogs/director/2018/07/improving_our_count.html (deeming the undercount of young children "a critical issue").

[16] U.S. Census Bureau, *Investigating the 2010 Undercount of Young Children—Analysis of Census Coverage Measurement Results: A New Design for the 21st Century* 1 (Jan. 2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-2017_04-undercount-children-analysis-coverage.pdf.

an undocumented family member.[17] That number does not take into account undocumented children themselves.[18]

The Secretary's decision to include a citizenship question on the census is thus poised to adversely impact an already vulnerable population. As the district court found, the prospect of undercount as a result of the introduction of a citizenship question is not merely theoretical. Based on the Census Bureau's own conservative statistics, introduction of the citizenship question would lead to an estimated 5.1% decline in self-response among noncitizen households. Pet. App. 114a. The Bureau has revised that number up to at least 5.8%. *Id.* Many, including hundreds of thousands of children living in households with an undocumented individual, will be rendered invisible, with direct ramifications on federal fund distribution and local education policy decisions based on census data. Respondents' expert demonstrated that a net differential undercount of people who reside in noncitizen households and Hispanic populations of as little as 2% would affect state-share funding programs. The estimated undercount would cause California, Florida, Hawaii, New Jersey, New York, and Texas to lose funding under state-share

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[17] American Immigration Council, *U.S. Citizen Children Impacted by Immigration Enforcement* 1 (May 2018), https://americanimmigrationcouncil.org/sites/default/files/research/us_citizen_children_impacted_by_immigration_enforcement.pdf.

[18] The Census Bureau has already acknowledged that individuals in "destinations for recent immigrants showed more confusion about whether to count a child in their household." *See Improving Count*, supra note 12.

programs, which include Title I Grants to Local Education Authorities (LEAs). Pet. App. 178a-80a. The court also determined based on the expert's testimony that a 2% net differential undercount of people who live in noncitizen households will cause the District of Columbia, Illinois, Maryland, Massachusetts, and Washington to lose funding under the Title I Grants to LEAs. *Id.* at 180a.

These statistics all serve to highlight the dramatic impact the accuracy of the census will have on millions of regulated parties, particularly public schools and the millions of students they serve. An undercount resulting from the addition of a citizenship question to the 2020 census would lead to the schools most in need of *more* resources to educate vulnerable populations receiving *less*.

Absent an express prohibition of judicial review or delegation of unreviewable discretion, Congress should not be presumed to have intended to commit such an extraordinarily consequential matter to the sole discretion of an executive agency. The enormous public importance of an accurate census count provides a further reason to require meaningful judicial review of the Secretary's actions.

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The census count impacts not only the democratic process, but also innumerable public institutions and people that depend on the count's accuracy. As amici can attest, the impact of an undercount on education funding and local education policymaking decisions would be devastating. A ruling committing such a critical decision to an executive agency's sole discretion despite the justiciable mandates and limitations imposed by the Constitution and statutes

would mark an unprecedented expansion of the traditionally narrow category of unreviewable agency action, and fundamentally rework the allocation of authority between the branches of government. The Secretary's decision is, and must at minimum be held to be, subject to judicial review.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

FRANCISCO M. NEGRÓN, JR.
Chief Legal Officer
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke Street, FL 2
Alexandria, VA 22314
(703) 838-6722

RICHARD P. BRESS
Counsel of Record
SAMIR DEGER-SEN
CHERISH A. DRAIN*
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
richard.bress@lw.com

*Admitted to practice in Pennsylvania only. All work supervised by a member of the DC Bar.

Counsel for Amici Curiae

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